IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-689

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
municipal corporations,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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May 5, 1978

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Pursuant to Rule 42(3) of the Rules of this Court, the Edison Electric Institute ("EEI") respectfully moves the Court for leave to file the brief *amicus curiae* annexed hereto. While Petitioner has granted its consent,[1] Respondents have refused to do so.

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1. Copies of the consent have been filed with the Clerk of the Court.

Interest of *Amicus Curiae*

EEI is the principal national association of electric utility companies. Its members serve 99.1% of all customers of the investor-owned segment of the utility industry and 77.1% of the nation's electricity users. Among EEI's interests are the development nationally of sound policies and procedures for the establishment of rates and tariffs by regulatory agencies.

At least ten of its members are presently parties in "price-squeeze" proceedings before the Federal Energy Regulatory Commission ("FERC"), and at least ten are defendants in private antitrust "price-squeeze" actions pending in at least ten different district courts.[2]

The decision below mandates that all such cases, all lengthy and complex, be tried simultaneously in both the FERC and a federal district court, each of which may apply different standards to their resolutions. The United States as *amicus curiae* encourages that result. Brief of the United States (hereinafter "Brief of the U.S."), filed May 2, 1978. The decision below also effectively requires each district court, in addition to the FERC, to determine the propriety of the level of wholesale rates charged by an EEI member to its municipal customers, and, in addition to the state regulatory agencies, to determine the propriety of the level of retail rates charged by an EEI member to its commercial and industrial customers. Piecemeal district court consideration of these national ratemaking issues flies in the face of Congress' recently articulated goal of a "comprehensive, centralized focus" for a national coordinated energy policy (Department of Energy Organization Act, Pub. L. No.

2. In addition to the proceedings listed in the Petition for Certiorari, pp. 11-12, it appears that "price-squeeze" allegations are now before the FERC in almost every current rate filing, and district court actions continue to be filed, *e.g., City of Anaheim, Cailfornia* v. *Southern California Edison Co.*, Docket No. 78-0810 (C.D. Cal.).

95-91, 91 Stat. 567, codified at 42 U.S.C. §§ 7101-7352 (1977)), a policy with which EEI and its members are cooperating.

A cumbersome and counterproductive scheme is mandated by the decision below; each member of EEI, which processes a wholesale rate filing, implements the resulting rates at its peril, until the successful conclusion of any potential private antitrust action, notwithstanding a finding by the FERC in that regulatory proceeding that the utility's rates were not only cost justified but were also not anticompetitive in either effect or intent. The dilemma faced by member utilities is highlighted by the positions set forth in the Brief of the U.S. Both the FERC and the Government oppose the petition sought herein and rather would require each utility to defend itself in private litigation until some undefined point at trial at which certain issues would be referred to the FERC.[3] The prejudice which results from the decision below to EEI's members and to their ratepayers causes us to support the petition for a writ of certiorari.

EEI as a national association holds a position from which it can meaningfully present the national importance of the issues herein to the scheme of federal and state regulation of utility rate tariffs. Taking a broader view than is naturally available to the individual parties herein, the annexed brief *amicus curiae*, in addition to endorsing the arguments of petitioner, demonstrates the public interest

3. At this point, there is a dichotomy between the positions of the FERC and the Government, which warrants present resolution by this Court. The FERC contends that eventually (at some undefined point in the litigation) every private action should be referred to it and that its determination of the merits would be binding upon the district court; the Government disagrees. EEI, for the reasons set forth in its brief *amicus curiae* annexed hereto, concurs with the FERC's argument that its determinations should be binding on the district court, but contends that the procedural framework suggested by the FERC would result in undue delay in the FERC's eventual determination of the issues and in a needless expenditure of resources by the judicial system and the litigating parties.

and Congressional intent in having a comprehensive, centralized focus for the determination of federal rate issues as part of the newly articulated coordinated national energy policy.

Conclusion

For the reasons stated above and in the annexed brief, EEI requests leave to file the annexed brief *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Edison Electric Institute ("EEI") supports the petition of Indiana & Michigan Electric Company for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in *City of Mishawaka* v. *Indiana & Michigan Electric Company,* 560 F.2d 1314 (7th Cir. 1977).

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set out in the motion for leave to file, which is bound together with the brief.

DISCUSSION

I.

THE PROCEDURE MANDATED BY THE COURT OF APPEALS IS CUMBERSOME, INEFFICIENT AND AGAINST THE PUBLIC INTEREST

The procedure adopted by the Court of Appeals in effect requires that all "price-squeeze" actions be tried in both the Federal Energy Regulatory Commission ("FERC") and a federal district court. Every public utility that files with the FERC for increases in its wholesale rates will never be assured of the lawfulness of these rates until an antitrust suit is commenced and concluded in a federal district court. Securities prospectuses and annual reports of public utilities which have filed for wholesale rate increases in the recent past may have to carry caveats warning of potential antitrust liability. Wholesale rate levels and the revenues resulting therefrom, although having been found reasonable and therefore lawful by the FERC, can subsequently be attacked as unlawful. Increased capital costs, borne by the public as utility ratepayers, are certain to result—an accurate reflection of the increased risks that come from subsequent district court review of rates previously deemed just, reasonable, and not anticompetitive by the FERC.

The untenable position which public utilities will be placed in if the decision below is allowed to stand is highlighted in the Brief *Amicus Curiae* of the United States ("Brief of the U.S."). The FERC recognizes that a determination of the reasonableness of a utility's rates must, at some point, be made by it. The FERC argues that its determination must be binding on a district court if the legal regulatory mechanism is to function efficiently. Court-

agency conflict seems inevitable given an approach that permits both the court and the agency to determine the competitive effects of rates set by the agency.

The Government is in sharp disagreement with the FERC on this point. It argues that the same rate determined by the FERC to be cost-justified and not anticompetitive might still be found, by a district court, to be anticompetitive (Brief of the U.S., pp. 22-23). But the Government's argument is clearly inconsistent with this Court's holding in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976). This Court held that the FERC had jurisdiction, and must exercise this jurisdiction, to consider any anticompetitive effects of rates it has set. Surely this Court's direction to exercise jurisdiction indicates that the FERC's determination is more than a mere advisory opinion which can be modified or discarded by a federal district court. Yet this is precisely the effect of the argument advanced by the Government, albeit without the support of the FERC.[1]

Furthermore, EEI feels constrained to point out the inefficiency and inconsistency inherent in the position advocated by the Government. In its Brief, the Government argues that a federal district court ought to remand certain issues for determination by the FERC. But it is difficult to justify engagement of the FERC's regulatory apparatus in light of the Government's later statement that the district court should not be bound by the determination of the FERC. Even if one disregards for a moment the peril to EEI's members that comes from dual investigations into the lawfulness of a single set of rates, it seems a great waste of

1. *Per contra,* even the Government appears to recognize that action by a state regulatory body establishing retail rates would insulate those rates from attack in a private antitrust suit. Brief of the U.S., p. 14, n. 5.

governmental resources to ask, indeed to require, an FERC determination of issues which will subsequently be redetermined by a district court.

In short, the scheme mandated by the court below, and supported by the Government, if not in whole by the FERC, sets up a costly and inefficient mechanism to determine "price-squeeze" issues. It greatly increases the risk of doing business for EEI's members, and plainly is a duplicative and therefore wasteful use of the courts and regulatory agencies.

II.

PETITIONER'S ARGUMENT IS SUPPORTED BY RECENT LEGISLATIVE AND ADMINISTRATIVE ACTION

Petitioner seeks certiorari on the grounds that the decision below directly conflicts with the principles of exclusive jurisdiction set forth in decisions of this Court and in the alternative that judicial economy requires that the FERC exercise primary judisdiction. EEI concurs with Petitioner's analysis of the applicable legal authorities and further suggests that recent legislative and administrative developments provide conclusive support for that position.

A. The Regulatory Gap Existing Prior to the Court's Decision in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976) Has Been Closed.

In *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976), this Court held that the FERC had jurisdiction which it must exercise to close the previously existing gap where no single regulatory agency oversaw the relationship between federally-set wholesale rates and state-set retail rates. Since the *Conway* decision the FERC has moved expeditiously to exercise its new jurisdiction. Procedural

rules have been issued.[2] In a majority of the numerous rate cases before the FERC in which municipal or cooperative electric distribution systems have intervened, "price-squeeze" issues have been raised; many such cases have already been decided by the FERC. Presently pending before the agency are at least ten other rate cases which involve, at least in part, "price-squeeze" issues. Moreover, pursuant to its rulemaking order relating to the procedure governing consideration of "price-squeeze" issues, the FERC will have the benefit of consulting with the various state regulatory agencies in these determinations.[3]

As a result, it is now clear that the FERC not only has the jurisdiction to consider these issues but also has acquired the technical expertise and experience to exercise that jurisdiction so that, with respect to such issues, a cohesive and coordinated national policy may be formulated. The need for such a policy has recently been recognized by both the FERC and the Antitrust Division of the Department of Justice. On February 17, 1978, the Antitrust Division of the Department of Justice filed a Petition for Leave to Intervene in the matter of *Boston Edison Company*, Docket No. E-7738. That petition, and the recent opinion of the FERC,[4] pursuant to which the remanded "price-

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2. F.P.C. Order 563, issued March 21, 1977, 42 Fed. Reg. 16131 (March 25, 1977), *rehearing denied*, F.P.C. Order 563-A, issued May 20, 1977, 42 Fed. Reg. 27574 (May 31, 1977).

3. *Id.* In the notice of the proposed rule, it was pointed out that:

> [T]his proceeding seems to be uniquely well suited to invocation of the cooperative Federal Power Commission state public service commission procedures authorized by Section 209(b) of the Federal Power Act. 41 Fed. Reg. at 32911.

The notice of the proposed "price-squeeze" rule additionally points out that "5 State Commissioners have agreed to serve as a board of consultants to advise this Commission. . ." 41 Fed. Reg. at 32911.

4. *Boston Edison Company*, F.P.C. Opinion No. 809-A, Docket Nos. E-7738 and E-7784 (December 9, 1977).

squeeze" hearing will continue, point up the extensiveness of the obligation of the FERC to weigh and determine antitrust issues which are alleged to have flowed from wholesale electric rate filings.

In brief summary, the Commission,[5] in Opinion No. 809, *Boston Edison Company,* Docket No. E-7738 and E-7784, (July 6, 1977), had ruled that it was an error to find Boston Edison's wholesale rates discriminatorily high vis-a-vis its retail industrial rates, where no anti-competitive effect was found, and where the record on the "price-squeeze" issue required more evidence. In its December Opinion No. 809-A, the Commission denied a stay of the remand of the "price-squeeze" issues; instead it ordered full hearings in order to develop "the most complete remanded record on the issue of price squeeze . . ." Opinion No. 809-A, p. 14.[6]

By its intervention in the *Boston Edison* proceeding, the Department of Justice indicated its recognition that public interests beyond those of the particular parties in that proceeding would be considered:

> That in view of the Commission's recently expressed desire for as complete a record as possible on the price squeeze issue the Department wishes to assist the Commission in developing that record and determining how best to apply antitrust law and policies to this issue. *Boston Edison Company,* Docket No. E-7738, Petition for Leave to Intervene of Department of Justice (February 17, 1978), Paragraph IV.

And the Department of Justice further noted, with respect to the remanded *Boston Edison* proceeding, that:

5. Commission refers to either the FERC or its predecessor, the Federal Power Commission, according to the context.

6. Of course, the intervention of the Department of Justice may well be meaningless if these municipal corporations versus public utilities antitrust suits proceed sporadically through the federal courts and do not undergo a threshold determination by the FERC.

> [T]his case will be the first Commission decision on the price-squeeze issue and will establish procedure and *law for all future proceedings.* (Emphasis added). Department of Justice Press Release, February 15, 1978.[7]

Moreover, recent action taken by Congress compels the conclusion that the cohesive and comprehensive treatment of the "price-squeeze" issue now being undertaken by the FERC with the assistance of the Antitrust Division is precisely that intended by Congress and that sporadic and conflicting district court antitrust actions would frustrate that goal.

7. The FERC has advised the parties to that proceeding to address the following issues, a clear indication that the FERC will consider evidence relating to any alleged anticompetitive effects of the rates it sets:

> 1. Whether in attempting to prove anticompetitive effect actual competition or the potential for competition or both must be shown?
>
> 2. If only a showing of potential competition were necessary, how would it be defined and measured?
>
> 3. In determining the existence of anticompetitive effect, what significance is there, if any, that publicly owned utilities may be involved?
>
> 4. Are the retail rates of the wholesale customer alleging price squeeze of any significance in determining actual or potential competition?
>
> 5. Is the intent of the public utility alleged to have caused a price squeeze germane for purposes of fashioning a price squeeze remedy?
>
> 6. In determining a remedy for price squeeze, are the actions of the state utility commissions affecting retail rates relevant, and, if so, how are they relevant?
>
> 7. In fashioning a price squeeze remedy what constitutes the lower range of the 'zone of reasonableness'?

Opinion No. 809-A, *supra* at pp. 14-15.

B. Congress Has Recently Articulated the Need for National Coordinated Energy Policy Making.

Recently, the Department of Energy Organization Act (Pub. L. No. 95-91, 91 Stat. 567, codified at 42 U.S.C. §§ 7101-7352 (1977)) (the "Act") became law. This legislation established a Department of Energy to assure a coordinated energy policy because:

> The Congress of the United States finds that —
>
> (4) responsibility for energy policy, regulation, . . . is fragmented in many departments and agencies and thus does not allow for the *comprehensive, centralized focus* necessary for effective coordination of energy supply and energy and conservation programs; . . . (Emphasis added). 42 U.S.C. § 7111.

In this legislation, Congress expressed its intent that the FERC would "carry out pricing and allocation decisions in the context of national energy policies, . . . with the development of national energy policy goals." S. Rep. No. 95-164, 95th Cong. 1st Sess. 7a (1977), p. 6.

The central goal of the Act is a nationally "coordinated energy policy" (42 U.S.C. § 7112(2)); the Act indicates specific legislative intent:

> (9) to promote the interests of consumers through the provision of an adequate and reliable supply of energy at the lowest reasonable cost;
>
> • • •
>
> (11) to provide for the cooperation of Federal, State, and local governments, in the development and implementation of national energy policies and programs;
>
> (12) to foster and assure competition among parties engaged in the supply of energy and fuel;[8]
>
> • • •

8. "The conference substitute also adopts the Senate language which emphasizes that a purpose of the Act is to foster and assure competition in the supply of energy and fuels. This purpose is declarative of present law which requires agencies to give attention to antitrust principles in formulating regulatory policies and decisions. The substitute also includes the Senate language providing for the encouragement and fostering of municipal, state and cooperatively-owned utilities as well as private enterprise in the development and achievement of energy policies." H.R. Conf. Rep. No. 95-539, 95th Cong. 1st Sess. 7a (1977), pp. 55-56.

> (17) to foster insofar as possible the continued good health of the Nation's . . . municipal utilities . . . 42 U.S.C. § 7112.

Moreover, in pursuit of a nationally coordinated energy policy, the Act specifically provides for resolution of conflicts with any state through consultations with appropriate state officials (42 U.S.C. § 7113).

Finally, new legislation will also expand the powers of the recently established division of regulatory interventions housed within the Economic Regulatory Administration's Utility Systems office of the Department of Energy. H.R. 4018, 95th Cong. 1st Sess. 123 Cong. Rec. S. 16158 (1977); H.R. 8444, 95th Cong. 1st Sess. 123 Cong. Rec. H. 8773 (1977), §§ 501 *et. seq.* The office will play a crucial role as advisor of state regulatory reviews of utility rates. The central function of the new division will be to intervene in utility rate cases and related state proceedings wherever it appears that policies of the federal government need to be voiced. Clearly, the administrative apparatus is now present which will handle effectively any allegations of wholesale-retail "price-squeezes". And the continued use of the federal courts to impose periodic, piecemeal reviews of these administrative actions will surely serve to disrupt the development of a coordinated, national policy on utility rates.

CONCLUSION

For all of the reasons stated above, EEI believes that this Court should grant the writ of certiorari requested by Indiana & Michigan Electric Company.

Respectfully submitted,

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